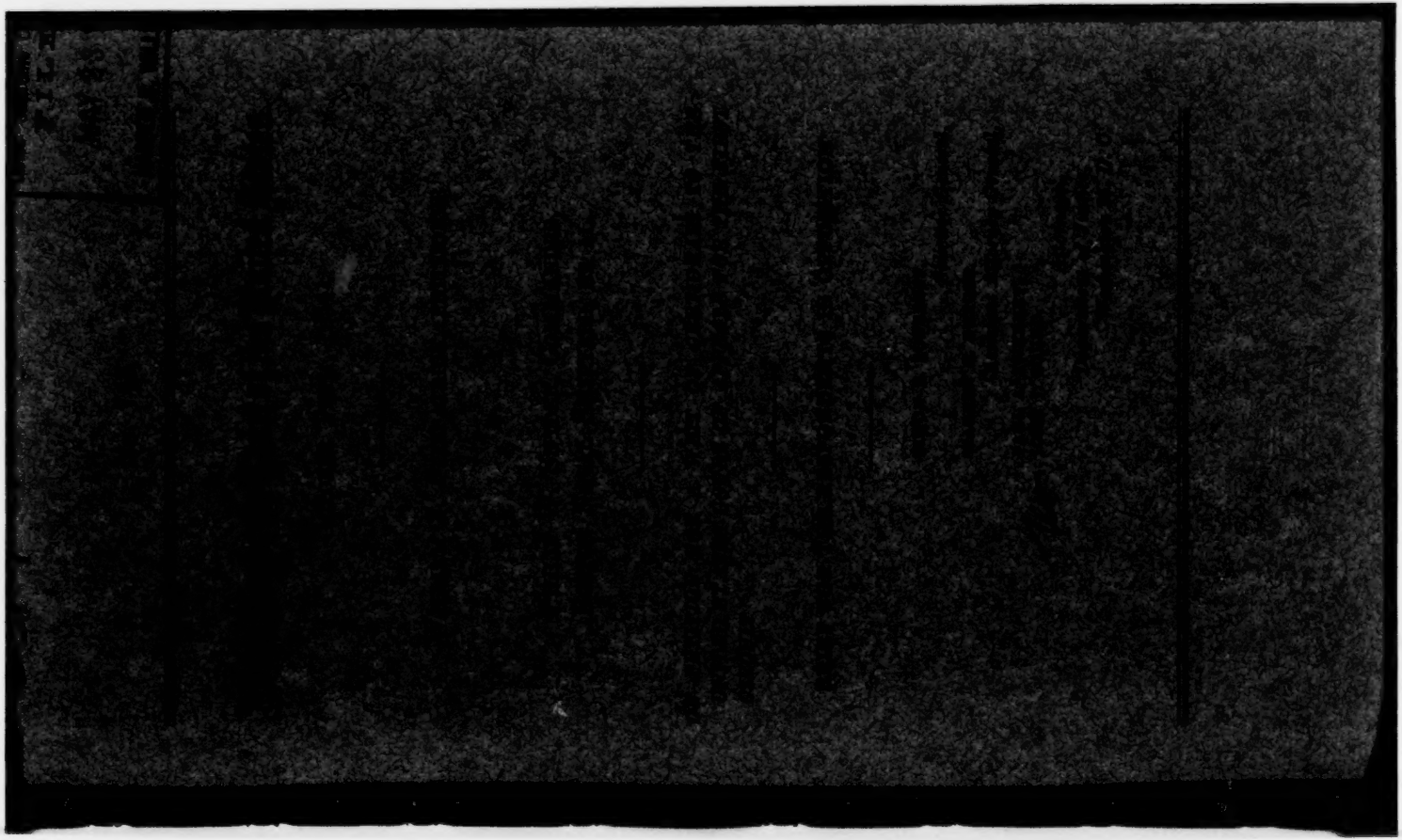

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 745

WILLIAM J. FITZPATRICK, PETITIONER

v.

PHILIP W. SNYDER, COMMANDER,
BOSTON NAVAL SHIPYARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Memorandum of Decision of the District Court on the motion for a preliminary injunction (R. 6-12) is not reported. The opinion of the District Court on final judgment (R. 13-24) is reported at 124 F. Supp. 96. The opinion and concurring opinion in the Court of Appeals (Pet. 25-33) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1955 (Pet. 33). The petition for a writ of certiorari was filed on April 23, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal district court has equitable jurisdiction of an action to enjoin the separation of a government employee from government service when the dismissal does not clearly violate any incontestable right of the employee under any federal statute and the employee has failed to exhaust his administrative remedies.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Veterans Preferance Act, the Whitten Amendment, and the Civil Service Regulations are set forth in the Appendix, *infra,* pp. 13-18.

STATEMENT

The petitioner on November 13, 1951, was given an "indefinite appointment" in the Civil Service with the Boston Naval Shipyard as a "helper machinist (R. 45) and was later promoted to "journeyman machinist" (Pet. 25). On June 21, 1954, because of a reduction in the shipyard's operations, the petitioner was notified that he would be separated from his employment on July 23, 1954, "because of reduction of force * * * due to a lack of work" (Pet. 25). On July 20, 1954, he brought this action in the United States District

Court for the District of Massachusetts, against the Commander of the Shipyard and the Chief Civilian Assistant to the Industrial Relations Officer, alleging that his separation would violate his rights under Section 12, of the Veterans' Preference Act, 5 U.S.C. 861, 58 Stat. 390, and seeking a preliminary injunction to prevent his separation and a declaration that he was entitled to be kept as an employee of the Shipyard (R. 1-5).

Petitioner complained that certain non-veteran employees "in [his] grade and position" were to be retained while he, a veteran, was to be separated (R. 4). These other employees were persons who through prior service as permanent government employees had acquired "competitive status". At the time these persons were rehired in the positions which they were holding when the petitioner brought his action, governing law prevented any appointments on a permanent basis; accordingly, they were granted "indefinite appointments in lieu of reinstatement" (Pet. 25-26), and by regulations were given retention rights over employees with simple "indefinite appointments." 5 C.F.R. 20.4(c). The petitioner challenged the validity of these regulations (R. 4-5).

The District Court issued a preliminary injunction on July 23, 1954, restraining the respondents from effecting the petitioner's separation (R. 13), but on September 17, 1954, having held the regulations valid (R. 23), entered a judgment dismissing the complaint (R. 25). On appeal, the Court of Appeals held that the complaint did not dem-

onstrate a "clear violation of some incontestable right under a federal statute" (Pet. 30), and that therefore, the petitioner having failed to exhaust his administrative remedies by answering his notice of separation and appealing to the Civil Service Commission under 5 U.S.C. 863, *infra*, pp. 13-14, the complaint should be dismissed "for lack of equity jurisdiction" (Pet. 31).[1]

ARGUMENT

Because of diminished operations, the Boston Naval Shipyard in June, 1954, found it necessary to cut its labor force. In accordance with governing regulations, the Shipyard gave notice to the petitioner that he would be separated at the end of thirty-two days. The petitioner had the right, on receipt of this notice, to file an answer in writing, and, upon an adverse decision by his superior, to appeal to the Civil Service Commission, 5 U.S.C. 863, 58 Stat. 390, as amended, 61 Stat. 723. The Shipyard would have been required to comply with any recommendation of the Commission. 5 U.S.C. 868, 58 Stat. 391, as amended, 62 Stat. 575. Had the Commission denied the petitioner's appeal, he could have sought relief in the District Court for the District of Columbia, cf. *Mulligan* v. *Andrews*, 211 F. 2d 28 (C.A. D.C.); *Goldman* v. *Summerfield*,

[1] In its judgment, the District Court, to prevent the case from becoming moot, restrained the respondents from separating the petitioner until November 1, 1954 (R. 25). A further order restraining the respondents was issued by the Court of Appeals on November 1, 1954 (Pet. 22), and, after the decision, the mandate of the Court of Appeals was stayed "until further order of this Court" (Pet. 33-34).

214 F. 2d 858 (C.A. D.C.). The petitioner did not follow these procedures, which would have fully protected his rights without disturbing the orderly administration of the Government's personnel program. He sought instead to require the continuance of his services by injunction. In these circumstances, we submit that the Court of Appeals properly decided that to grant the injunction the petitioner sought was beyond the equitable jurisdiction of the District Court.

1. It is clear that in all but extraordinary circumstances a party cannot seek to restrain the operations of the Government by judicial action without first resorting to the administrative procedures which have been provided as a remedy for his grievances. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. This salutary principle has been recognized and applied in cases involving the Veterans' Preference Act, not only by the court below, but by the Court of Appeals for the District of Columbia Circuit (*Johnson* v. *Nelson*, 180 F. 2d 386, certiorari denied, 339 U.S. 957; *Green* v. *Baughman*, 214 F. 2d 878), the District Court for the Southern District of New York (*Akelmacker* v. *Kelly*, 101 F. Supp. 528; *Leeds* v. *Rossell*, 101 F. Supp. 481), and the District Court for the Eastern District of Pennsylvania (*Breiner* v. *Wallin*, 79 F. Supp. 506).

The principle of requiring resort to administrative remedies, in addition to carrying out the clear intention manifested by Congress in providing

them, is grounded upon two considerations. First, in this way advantage is taken of the experience and special knowledge of those most familiar with the problem involved. Second, the minimum disruption of orderly Governmental operations occurs. Each of these considerations has special relevance in this case. The long experience and specialized knowledge of the Civil Service Commission in matters of this kind is clear. Preference for veterans in Government employment has existed for almost eighty years, and throughout almost all of this period the Commission has played a major role in the interpretation and application of the governing statutes and executive orders. See Civil Service Act of 1883, § 7, 22 Stat. 406; 37 Stat. 360, 413. The Commission was responsible for the language finally adopted in the retention provisions of the Veterans' Preference Act under which the petitioner claims (see H. Rep. No. 1289, 78th Cong., 2d Sess., p. 6; *Elder* v. *Brannan,* 341 U.S. 277, 285), and is specifically charged with making and enforcing "appropriate rules and regulations to carry into full effect the provisions, intent, and purpose" of the Act. 5 U.S.C. 868, 58 Stat. 391, as amended, 62 Stat. 575.

No less clear is the fact that to grant employees in the petitioner's position injunctive relief would severely disrupt orderly reductions in force when a Government agency is faced with the necessity of curtailing its operations, and would place an undue burden on the Government's finances. For inasmuch as there was no clear violation of the governing law in retaining the employees whose retention

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the petitioner challenges (see pp. 8-11, *infra*), injunctive relief would also be available, we assume, to any of those employees laid off as the result of the injunction granted the petitioner. Thus, even though one or the other must eventually have failed, the Government would have been required in the meantime to retain and pay unneeded employees.[2] While the petitioner, if he had resorted to his administrative remedies, might eventually have won reinstatement and back pay, in which event the Government would ultimately have had to pay both his wages and those of the employee who was retained in his stead, under the petitioner's contentions, this would be not a possibility but a certainty.

Because no interest of the petitioner would have been irreparably injured by the lack of injunctive relief, and because the appropriate remedies set forth by Congress were not followed, the Court of Appeals was clearly correct in finding a lack of equitable jurisdiction.

2. The court below observed that where there is "a clear violation of some incontestable right under a federal statute" injunctive relief may be granted although administrative remedies have not been exhausted. This exception to the general rule was indicated by this Court in a case which the petitioner cites, *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 566:

[2] In the instant case, the petitioner was employed in a full duty status for over three months beyond the proposed time of his separation. On November 1, 1954, in order to obtain a further restraining order from the Court of Appeals, he agreed to be placed in a leave-without-pay status (R. 22).

> Of course, where the statute is so obviously violated that "a sacrifice or obliteration of a right which Congress . . . created" to protect the interest of individuals or the public is clearly shown, a court of equity could, in a proper case, intervene.

The Court recognized, however, that any such exception must be narrowly drawn, for it went on to state (*ibid.*):

> * * * But here it does not clearly appear whether the statute has been violated or complied with or that the threatened action "would be prejudicial to the public interest."

In the instant case, there was not only lacking a clear violation of the statute; there was compliance with the statute as interpreted in a regulation reasonably calculated to give "full effect" to the provisions and purpose of the Veterans' Preference Act.

The Veterans' Preference Act provides with reference to reductions in force that (5 U.S.C. 861, 58 Stat. 390):

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings * * *.

As this Court recognized in *Elder* v. *Brannan*, 341

U.S. 277, 283, the key to the application of this provision lies in the term "competing employees", and

> since the statute does not supply a definition, we must determine from the legislative history of the Act, and from prior legislation and regulations, whether the Commission's definition may reasonably be said to "carry into full effect the provisions, intent, and purpose [of the statute]".

In that case, this Court upheld a Civil Service Commission regulation which differentiated between employees having "the equivalent of classified civil service status" whose appointments were without time limitation and employees whose appointments were limited to the duration of the war plus six months, and accorded non-veteran employees in the former group a higher retention rating than veteran employees in the latter.

Neither the petitioner nor those employees whose retention he challenges were permanent employees at the time the Shipyard proposed to reduce its force. All were hired during the period of hostilities in Korea when Government operations were greatly expanded,[3] and at a time when Congress had enacted the Whitten Amendment (a part of the Supplemental Appropriations Act of Septem-

[3] The petitioner was hired November 13, 1951 (R. 45). The three persons over whom he specifically claims a retention preference were hired in December, 1950, and January and March, 1951 (R. 35-36).

ber 27, 1950), "in order to prevent increases in the number of permanent personnel." 64 Stat. 1066. This statute, together with Executive Order 10180, 15 F.R. 7745, and Civil Service Rule 2.115, 5 C.F.R. 2.115, which carried it into effect, prevented the granting of other than "indefinite appointments" to any Government employees except Presidential appointees and postmasters. It applied alike to the reinstatement of employees with "competitive status" and the hiring of new employees with no prior civilian Government service.[4] An incidental effect of the Amendment was to render the governing rules of the Civil Service Commission, which had been upheld in *Elder* v. *Brannan,* obviously inadequate to accord to personnel with "competitive status" the protection which this Court in that case had recognized as traditional. Therefore, the Commission adopted the most reasonable means of adapting the rule of *Elder* v. *Brannan* to the new circumstances created by this emergency legislation. In its Retention Preference Regulations, 5 C.F.R. 20.1, 20.4(c), the Commission recognized three groups: *I. Career* (permanent employees), *II. Career-Conditional* (employees with "competitive status" receiving indefinite appointments in lieu of reinstatement), and *III. Indefinite* (employees without "competitive status"). Within each group, those with veterans' preference were given a higher retention rating than those without it, but all persons in a higher group were to be

[4] The limitation extended to the promotion of permanent employees to a higher grade as well as to the appointment of persons not already in Government service.

preferred over those in a lower. In thus carrying forward fundamental principles which had already been proved valid, the Commission's action was clearly within the regulatory powers entrusted to it by Congress.

The petitioner contends that, but for the Whitten Amendment, both he and the other employees would have received permanent appointments, and that under this Court's decision in *Hilton* v. *Sullivan*, 334 U.S. 323, he would have been entitled to a higher place on the Shipyard's retention roster. But his appointment cannot be considered without reference to the emergency conditions in which it occurred, and the Whitten Amendment was only a part of the restrictions placed on the granting of permanent appointments immediately after the Korean hostilities began. Two months before the enactment of the Amendment, the Civil Service Commission had concluded an agreement with the Departments of Defense, Army, Navy, and Air Force, authorizing the use of emergency-indefinite appointments under Civil Service Regulations 2.114(h), 5 C.F.R. 2.114(h), (R. 56-71). It is clear, therefore, that without the Whitten Amendment the petitioner might still have received only an indefinite appointment while those whose retention he challenges might have been restored to permanent positions, for the agreement provided in paragraph A that all possible positions would be filled by reinstating persons with "competitive status" on Reinstatement Reserve Lists. In such circumstances, their higher retention ratings would have been indisputable.

3. Chief Judge Magruder, in his concurring opinion below (Pet. 31-33), noted that it "seems difficult to avoid the conclusion that the present suit is in substance one against the United States," and "that the United States has not consented to be sued in this manner" (Pet. 31). Inasmuch as a judgment in the petitioner's favor would in fact require the Government to continue employing and paying the petitioner, the logic of this position seems inescapable. Because the point was not reached by the full court below, and since the judgment is firmly founded on other sound principles, we do not believe this Court should undertake review on this ground. But the consequences which Judge Magruder so clearly delineates emphasize the validity of the decision by the entire court that no occasion for equitable relief was presented. Such relief is largely within the discretion of the court, and no abuse of that discretion has been shown.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1955.

APPENDIX

The pertinent portions of the Veterans' Preference Act, 5 U.S.C. 851 *et seq.*, are as follows:

Section 12 (5 U.S.C. 861, 58 Stat. 390):

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: * * *

Section 14 (5 U.S.C. 863, 58 Stat. 390, as amended, 61 Stat. 723):

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than

> thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: * * *

Section 19 (5 U.S.C. 868, 58 Stat. 391, as amended, 62 Stat. 575):

> It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and pur-

pose of this chapter and such Executive orders as may be issued pursuant thereto and in furtherance thereof: *Provided,* That any recommendation by the Civil Service Commission, submitted to any Federal agency, on the basis of the appeal of any preference eligible, employee or former employee, shall be complied with by such agency.

The Whitten Amendment, 64 Stat. 1066, provided in pertinent part:

> After September 1, 1950, and during the fiscal year 1951:
>
> (a) In making appointments in the Government service the Civil Service Commission shall make full use of its authority to make temporary appointments in order to prevent increases in the number of permanent personnel and no employee in the Federal civil service promoted, transferred or appointed to a position of higher grade shall be eligible, in the event of separation from the service through reduction in force, to reinstatement at a grade above the grade held by such employee on September 1, 1950; and all reinstatements, transfers or promotions to positions in the Federal civil service shall be temporary and for positions subject to the Classification Act of 1949 shall be made with the condition and notice to the individual reinstated, transferred or promoted that the classification grade of the position is subject

to post-audit and correction by the appropriate departmental or agency personnel office or the Civil Service Commission * * * .

Section 2.115 of the Civil Service Commission regulations, 5 C.F.R. 2.115, provides in pertinent part:

Indefinite appointment—(a) *In general.* On and after December 1, 1950, all new appointments shall be indefinite appointments except those of postmasters in all classes of post offices and, in unusual circumstances, appointments to positions for which the Commission determines that probational appointments are in the interest of the service * * * Such indefinite appointments shall be made from the Commission's registers of eligibles unless there are insufficient available eligibles. The Commission may restrict certification for indefinite appointment to eligibles that are immediately available because of residence or other conditions. The first year of service under an indefinite appointment shall be a trial period similar to the probationary period established by § 2.113. Persons given such appointments do not thereby acquire a permanent civil service status. * * *

Section 20.4(*c*) of the Civil Service Commission regulations, 5 C.F.R. 20.4(*c*), provides in pertinent part:

Determination of tenure groups. For the

purpose of determining relative retention preference in reductions in force, competing employees with performance ratings of "Satisfactory" or better shall be classified according to tenure of employment and veteran preference in groups and subgroups as follows:

(1) *Group I—Career.* In the competitive service, this group consists of career employees who have completed probation and who are not "temporary" or "indefinite" as the result of promotion, transfer or reinstatement, except that career employees serving under conditional promotions shall be considered in this group with respect to positions at and below the grade in which they last served on a permanent basis. In positions excepted from the competitive service, this group includes all employees serving under appointments with no conditions or restrictions. Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B".

(2) *Group II—Career-Conditional.* In the competitive service, this group includes career employees who are conditional because they are serving probationary periods, or are "temporary" or "indefinite" as the result of promotion, transfer or reinstatement, or are subject to some other limitation of a similar nature. In positions excepted from the competitive service, it includes employees who are conditional solely as the result of promo-

tion or reinstatement. Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B".

(3) *Group III—Indefinite.* This group includes persons serving under non-status nontemporary appointments in positions in the competitive service. It also includes employees in positions excepted from the competitive service serving under any condition or limitation other than a conditional promotion or reinstatement or a specific time limitation of one year or less. Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B".

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